



4310-05-P

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 926

SATS No. MT-034-FOR; Docket ID No. OSM-2011-0018

Montana Regulatory Program

AGENCY: Office of Surface Mining Reclamation and Enforcement, Interior.

ACTION: Final rule; approval of amendment.

SUMMARY: We are approving an amendment to the Montana regulatory program (the "Montana program") under the Surface Mining Control and Reclamation Act of 1977 ("SMCRA" or "the Act"). Montana proposed revisions to and additions of statutory definitions of approximate original contour, in situ coal gasification, and recovery fluid. Montana revised its program to clarify ambiguities and improve operational efficiency. Montana intends

to promulgate regulations pertaining to in situ coal gasification within one year. The statutory revisions discussed here will support that future rulemaking effort.

EFFECTIVE DATE: [Insert date of publication in the Federal Register]

FOR FURTHER INFORMATION CONTACT: Jeffrey Fleischman, Chief, Casper Field Office, Telephone: (307) 261-6550, email address: jfleischman@osmre.gov.

SUPPLEMENTARY INFORMATION:

- I. Background on the Montana Program
- II. Submission of the Proposed Amendment
- III. Office of Surface Mining Reclamation and Enforcement's (OSM's) Findings
- IV. Summary and Disposition of Comments
- V. OSM's Decision
- VI. Procedural Determinations

I. Background on the Montana Program

Section 503(a) of the Act permits a State to assume primacy for the regulation of surface coal mining and reclamation operations

on non-Federal and non-Indian lands within its borders by demonstrating that its State program includes, among other things, "a State law which provides for the regulation of surface coal mining and reclamation operations in accordance with the requirements of this Act...; and rules and regulations consistent with regulations issued by the Secretary pursuant to this Act." See 30 U.S.C. 1253(a)(1) and (7). On the basis of these criteria, the Secretary of the Interior conditionally approved the Montana program on April 1, 1980. You can find background information on the Montana program, including the Secretary's findings, the disposition of comments, and conditions of approval in the April 1, 1980, Federal Register (45 FR 21560). You can also find later actions concerning Montana's program and program amendments at 30 CFR 926.15 and 926.30.

II. Submission of the Proposed Amendment

By letter dated August 19, 2011, Montana sent us an amendment to its program (Administrative Record No. MT-31-01) under SMCRA (30 U.S.C. 1201 et seq.). Montana submitted the amendment at its own initiative.

We announced receipt of the proposed amendment in the December 6, 2011, Federal Register (76 FR 76111; Administrative Record No.

MT-31-10). In the same document, we opened the public comment period and provided an opportunity for a public hearing or meeting on the amendment's adequacy. We did not hold a public hearing or meeting because no one requested one. The public comment period ended on January 5, 2012. We received comments from two Federal agencies, one State agency, and one industry group.

III. OSM's Findings

Following are the findings we made concerning the amendment under SMCRA and the Federal regulations at 30 CFR 732.15 and 732.17.

We are approving the amendment.

A. Minor Revisions to Montana's Statute

Montana proposed recodification changes to its statutory definitions. MCA §82-4-203(27) through (56) have been recodified as MCA §82-4-203(28) through (58). The addition of two new definitions (discussed below) necessitated these changes. These non-substantive changes do not alter the definitions' meaning or effectiveness.

Because these changes are minor, we find the provisions remain no

less stringent than SMCRA.

B. Revisions to Montana's Statute That Are Not the Same as the Corresponding Provisions of the Federal Statute

Montana proposed revisions to its statutory definition of Approximate Original Contour (AOC). The existing definition contained language similar to the Federal definition of AOC as well as additional stipulations. Montana proposed to reference its definition of "hydrologic balance" within its existing AOC definition. The Federal counterpart definition does not employ the term hydrologic balance.

The proposed addition has no effect beyond referring the reader to the definition of an existing term. This addition does not alter the definition's meaning or effectiveness. This definition remains no less stringent than SMCRA.

C. Revisions to Montana's Statutes With No Corresponding Federal Statutes

Montana proposed two new definitions which do not have Federal counterparts under SMCRA: "in situ coal gasification" and "recovery fluid."

Montana proposed to define "in situ coal gasification" whereas SMCRA defines "in situ processing." The Federal definition lists in situ gasification as one type of in situ processing. Montana is proposing to define a subset of what the Federal Program defines. Montana's proposed language directly mirrors Wyoming's existing definition of "in situ mining." Wyoming's definition was approved on March 31, 1980 (45 FR 20930), under the partial approval of its original program. That approval set precedent for the definition Montana recently proposed.

Montana's proposed definition excludes "the storage of carbon dioxide in a geologic storage reservoir" from inclusion under in situ coal gasification. This phrase precludes in situ gasification projects from including carbon capture and sequestration (CCS) under the Montana coal regulatory program.

Montana Senate Bill 498 (SB498) designated the Board of Oil and Gas Conservation as the regulatory authority for CCS activities within the State. SB498 generally established that land surface owners own the pore space below the surface unless it is otherwise documented. As such, the Board would regulate any proposed CCS activities appropriately. CCS operations have potential environmental impacts such as groundwater contamination

which, by exclusion from regulation under in situ coal gasification, would be avoided under Montana's coal regulatory program (CCS would invoke a separate regulatory scheme). For this reason, excluding CCS from in situ coal gasification is more stringent than the Federal Program because the Federal Program does not address this issue at all.

Montana's new definition provides a technically accurate description of in situ coal gasification. Because there is precedent for Montana's proposed definition, the proposed language exceeds what is defined or restricted under the Federal program, and the definition is technically accurate, this addition is no less stringent than SMCRA.

Montana proposed to define "recovery fluid." The Federal Program does not define this term; however, the Wyoming program approved by OSM on March 31, 1980 (45 FR 20930) defines this term. That approval set precedent for the definition Montana recently proposed. Montana's new definition provides a technically accurate description of recovery fluid. Because there is precedent for Montana's proposed definition, the proposed language is technically accurate, and Montana exceeds what is defined under the Federal program, this addition is no less stringent than SMCRA.

We are approving all of Montana's August 19, 2011 proposed amendments.

IV. Summary and Disposition of Comments

Public Comments

We asked for public comments on the amendment (Administrative Record ID No. MT-31-10), but did not receive any.

Federal Agency Comments

Under 30 CFR 732.17(h)(11)(i) and section 503(b) of SMCRA, we requested comments on the amendment from various Federal agencies with an actual or potential interest in the Montana program (Administrative Record ID No. MT-31-3).

By letter dated November 1, 2011, the Mine Safety and Health Administration (MSHA) responded to our request (Administrative Record ID No. MT-31-08). MSHA concurs with the proposed revisions. We agree with MSHA that the proposed revisions are acceptable.

By letter dated November 1, 2011, the Bureau of Land Management (BLM) Montana State Office responded to our request (Administrative Record ID No. MT-31-09). The BLM stated that the proposed changes appear to be substantially in agreement with the corresponding Federal regulations and are therefore no less stringent than SMCRA. The BLM has no objection to the proposed amendments. We agree with BLM's assessment.

Environmental Protection Agency (EPA) Concurrence and Comments

Under 30 CFR 732.17(h)(11)(ii), we are required to obtain concurrence from EPA for those provisions of the program amendment that relate to air or water quality standards issued under the authority of the Clean Water Act (33 U.S.C. 1251 et seq.) or the Clean Air Act (42 U.S.C. 7401 et seq.). None of the revisions that Montana proposed to make in this amendment pertains to air or water quality standards. Therefore, we did not ask EPA to concur on the amendment.

Under 30 CFR 732.17(h)(11)(i), OSM requested comments on the amendment from EPA (Administrative Record Document ID No. MT-31-3) by letter dated September 28, 2011. EPA did not respond to our request.

State Historic Preservation Officer (SHPO) and the Advisory
Council on Historic Preservation (ACHP)

Under 30 CFR 732.17(h)(4), we are required to request comments from the SHPO and ACHP on amendments that may have an effect on historic properties. On September 28, 2011, we requested comments on Montana's amendment (Administrative Record ID Nos. MT-31-4 and MT-31-5). By letter dated September 26, 2011, the SHPO responded to our request (Administrative Record ID No. MT-31-07). The SHPO believes the proposed changes do not appear to degrade consideration of cultural resources in any less effective fashion than required in Federal regulations. We agree with the SHPO's assessment.

V. OSM's Decision

Based on the above findings, we approve Montana's August 19, 2011 amendment. To implement this decision, we are amending the Federal regulations at 30 CFR Part 926, which codify decisions concerning the Montana program. We find that good cause exists under 5 U.S.C. 553(d)(3) to make this final rule effective immediately. Section 503(a) of SMCRA requires that the State's program demonstrates that the State has the capability of carrying out the provisions of the Act and meeting its purposes.

Making this regulation effective immediately will expedite that process. SMCRA requires consistency of State and Federal standards.

VI. Procedural Determinations

Executive Order 12630 - Takings

This rule does not have takings implications. This determination is based on the analysis performed for the counterpart Federal regulation.

Executive Order 12866 - Regulatory Planning and Review

This rule is exempted from review by the Office of Management and Budget (OMB) under Executive Order 12866 (Regulatory Planning and Review).

Executive Order 12988 - Civil Justice Reform

The Department of the Interior has conducted the reviews required by section 3 of Executive Order 12988 and has determined that this rule meets the applicable standards of subsections (a) and (b) of that section. However, these standards are not applicable

to the actual language of State regulatory programs and program amendments because each program is drafted and promulgated by a specific State, not by OSM. Under sections 503 and 505 of SMCRA (30 U.S.C. 1253 and 1255) and the Federal regulations at 30 CFR 730.11, 732.15, and 732.17(h)(10), decisions on proposed State regulatory programs and program amendments submitted by the States must be based solely on a determination of whether the submittal is consistent with SMCRA and its implementing Federal regulations and whether the other requirements of 30 CFR Parts 730, 731, and 732 have been met.

Executive Order 13132 - Federalism

This rule does not have Federalism implications. SMCRA delineates the roles of the Federal and State governments with regard to the regulation of surface coal mining and reclamation operations. One of the purposes of SMCRA is to "establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations." Section 503(a)(1) of SMCRA requires that State laws regulating surface coal mining and reclamation operations be "in accordance with" the requirements of SMCRA, and section 503(a)(7) requires that State programs contain rules and regulations "consistent with" regulations issued by the Secretary pursuant to SMCRA.

Executive Order 13175 - Consultation and Coordination With Indian Tribal Governments

In accordance with Executive Order 13175, we have evaluated the potential effects of this rule on Federally recognized Indian Tribes and have determined that the rule does not have substantial direct effects on one or more Indian Tribes, on the relationship between the Federal government and Indian Tribes, or on the distribution of power and responsibilities between the Federal government and Indian Tribes. The rule does not involve or affect Indian Tribes in any way.

Executive Order 13211 - Regulations That Significantly Affect The Supply, Distribution, or Use of Energy

On May 18, 2001, the President issued Executive Order 13211, which requires agencies to prepare a Statement of Energy Effects for a rule that is (1) considered significant under Executive Order 12866, and (2) likely to have a significant adverse effect on the supply, distribution, or use of energy. Because this rule is exempt from review under Executive Order 12866 and is not expected to have a significant adverse effect on the supply,

distribution, or use of energy, a Statement of Energy Effects is not required.

National Environmental Policy Act

This rule does not require an environmental impact statement because section 702(d) of SMCRA (30 U.S.C. 1292(d)) provides that agency decisions on proposed State regulatory program provisions do not constitute major Federal actions within the meaning of section 102(2)(C) of the National Environmental Policy Act (42 U.S.C. 4332(2)(C) et seq).

Paperwork Reduction Act

This rule does not contain information collection requirements that require approval by OMB under the Paperwork Reduction Act (44 U.S.C. 3501 et seq.).

Regulatory Flexibility Act

The Department of the Interior certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.). The State submittal, which is the subject of this

rule, is based upon counterpart Federal regulations for which an economic analysis was prepared and certification made that such regulations would not have a significant economic effect upon a substantial number of small entities. In making the determination as to whether this rule would have a significant economic impact, the Department relied upon the data and assumptions for the counterpart Federal regulations.

Small Business Regulatory Enforcement Fairness Act

This rule is not a major rule under 5 U.S.C. 804(2), of the Small Business Regulatory Enforcement Fairness Act. This rule:

- a. Does not have an annual effect on the economy of \$100 million.
- b. Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions.
- c. Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S. based enterprises to compete with foreign-based enterprises.

This determination is based upon the fact that the State submittal, which is the subject of this rule, is based upon

counterpart Federal regulations for which an analysis was prepared and a determination made that the Federal regulation was not considered a major rule.

Unfunded Mandates

This rule will not impose an unfunded mandate on State, local, or tribal governments or the private sector of \$100 million or more in any given year. This determination is based upon the fact that the State submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an analysis was prepared and a determination made that the federal regulation did not impose an unfunded mandate.

List of Subjects in 30 CFR Part 926

Intergovernmental relations, Surface mining, Underground mining.

Dated: April 27, 2012.

Allen D. Klein
Director,
Western Region

For the reasons set out in the preamble, 30 CFR part 926 is amended as set forth below:

PART 926 - Montana

1. The authority citation for part 926 continues to read as follows:

Authority: 30 U.S.C. 1201 et seq.

2. Section 926.15 is amended in the table by adding a new entry in chronological order by "Date of final publication" to read as follows:

§ 926.15 Approval of Montana regulatory program amendments

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Original amendment submission date	Date of final publication	Citation/description
* * * * *	* *	
August 19, 2011	[<u>Insert date of publication in the Federal Register</u>]	MCA 82-4-203(4)(c) (definition of AOC); addition of -203(27) "in situ coal gasification;" -203(44) "recovery fluid;" recodification of former -203(27) through (56)

[FR Doc. 2012-23087 Filed 09/18/2012 at 8:45 am; Publication Date: 09/19/2012]